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October 28, 1997

Richard L. Harvey
WBHX
1018 Hillcrest Drive
Neshanic Station, New Jersey
08853

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OCT 30 1997

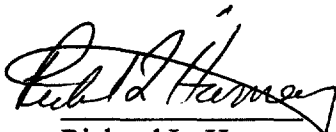
FCC MAIL ROOM

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Sir:

Attached please find the original and nine copies of our **Comments on the Notice of Proposed Rule Making** on MM Docket No. 97-182.

Sincerely,


Richard L. Harvey

9 enclosures

No. of Copies rec'd
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before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FCC MAIL ROOM

In the Matter of)	
)	
Preemption of State and Local Zoning)	MM Docket No. 97-182
and Land Use Restrictions on the Siting,)	
Placement and Construction of Broadcast)	
Station Transmission Facilities)	

COMMENTS ON THE NOTICE OF PROPOSED RULE MAKING

The Commission in the subject Notice of Proposed Rule Making ("NPRM") is considering whether and in what circumstances to preempt certain state and local zoning and land use ordinances which present an obstacle to the institution and improvement of radio and television broadcast service. The Commission is considering whether to consider all broadcast facilities or only those involved in the implementation of digital television ("DTV") service. It is also seeking, among other items, information about experiences, both positive and negative, that broadcasters have had with state and local land use approvals.

WBHX's Experience

WBHX is an unbuilt class A FM station assigned to Tuckerton, NJ. The Tuckerton area is suburban and rural in some areas. Transmitter siting problems have

kept WBHX from beginning operation. The Commission's rules and state/local land use rules are in conflict. This has made it very difficult to locate suitable properties and even more difficult to obtain the required local approvals.

Under the Commission's rules, WBHX can place its transmitter in two distinct separate areas. The first area, the larger area, is about 4 sq. miles. However, most all of this area is within the New Jersey State Pinelands protected area. The Pinelands are an environmentally sensitive area and, although the land is privately owned, almost all development is prohibited. Towers are not permitted and there is no provision for any waivers. Most of the remaining portion of this area is part of a New Jersey state park. The remaining portion, where there is no NJ State prohibition, is very small, only 4/100 sq. mile. There are seven properties here, all under the same municipal zoning authority, in the same zoning district. This area is sparsely populated. There are no tall structures in the area.

The other allowable area, under the Commission's rules, is located on an ocean barrier island. This area is only about 1/4 sq. mile. This area is fully developed and consists mostly of residential and rental properties. The population density is in excess of 2,000 people per sq. mile. The town passed an ordinance limiting all structures to 32 feet height in response to the potential of WBHX locating its tower here ¹.

¹There are no structures higher than two stories in this area except for a 100 foot tower on the very edge of the allowable area. Until recently it was thought that this tower was just outside the allowable area and not usable, but new information has changed this. WBHX is proceeding to move its transmitter site to this tower.

Given the characteristics of these two potential locations, WBHX proceeded with the sparsely populated location. Since only seven properties were available, it took over two years to negotiate a lease with one of the property owners (most owners were either not interested or would not respond to inquiries).

The proposed site is a 69 acre fully wooded lot adjacent to state owned undeveloped forest. The 300 foot by 2 foot wide tower was to be located in the center of the lot. There are only a couple of homes in the area, but none closer than about 1/4 mile. Since this property was in a sparsely populated area, we felt that we would not meet with objections; however, this was not the case. Several residents objected based on health concerns, property values and the safety of children who might climb the tower. The Zoning Board questioned the logic behind the Commission's rules and hired a consultant to study those rules with the goal of finding a way under the rules to move the tower out of the area.

In the end the Zoning Board ruled against the proposal because, among other reasons, they felt it should be located in a more populated area closer to those that would be using the radio station. Since there were no structures like this here they felt that it shouldn't be allowed. They also cited the potential interference to television reception and possible harm to birds. Of note, the town had already allowed two cellular telephone facilities outside this area but within the town's boundaries.

The Zoning Board's decision was then appealed to the Superior Court of New Jersey Law Division, Burlington County. The Superior Court Judge supported the Zoning Board decision. He wrote:

Just because a distant federal agency for largely technical reasons focuses attention on a tiny spot of land it deems suitable for a broadcast antenna is no reason to conclude under state zoning and environmental policy, a township characterized by extensive pinelands should bear the burden it imposes or the detriment it foists on the public.

A timeline of the zoning process is attached as Appendix A.

The Siting Problem

The siting problem which the Commission seeks to solve in the NPRM is not restricted to top 30 markets, as our experience shows. The current problems stem from greater competition for tower space from Cellular and PCS. The difficult zoning situations are also a result brought on by the boom in Cellular and PCS. Zoning officials are less likely to allow additional towers into their communities. They view broadcast towers as "more undesirable" than cellular or PCS since broadcast towers are generally taller and operate at higher power. In the case of WBHX, the Superior Court Judge called the project a "LULU", a locally unwanted land use.

Resolving Disputes

The Commission is seeking input as to its role in resolving disputes. The NPRM asks if the Commission should act as arbitrator, mediator or simply the provider of a forum to which parties can turn for suggestions on resolving local disputes. In the case of

WBHX, the core reason for the dispute is that the Commission's rules and the NJ State/local land use rules are in conflict. We view the disagreement as a difference between what local authorities would allow and what the Commission will allow. WBHX is caught in the middle.

In *some* instances, the Commission needs to provide for additional flexibility of its rules to help resolve the zoning dispute. The Commission should empower a mediator to waive some of the Commission's rules where this can be done without compromising the technical quality of the broadcast service. In the case of WBHX, we feel that the town would allow us to locate elsewhere within its borders if the Commission's spacing rules could be relaxed². It makes little sense to impose new towers on a community when there are nearby towers that could be used with some additional flexibility in the Commission's rules.

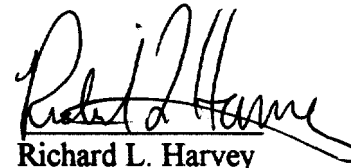
In other cases, where it is not possible or useful to provide additional flexibility in the Commission's rules, the Commission must obtain flexibility of the local land use rules in order to resolve the dispute.

² The spacing rules that limit WBHX's location is the second adjacent spacing between Class A stations requirement. There are second adjacent class A stations both to the north and south of WBHX. Since WBHX is a 1989 Grandfathered class A station, the flexibility provided via contour protection is not available (the original spacing required was 27 km. and Section 73.215 requires 29 km.). Recently the Commission changed its rules to allow some grandfathered FM stations to relocate without regard to second-adjacent channels. WBHX is not included in this group. The fact that some stations can have this flexibility shows that the Commission can provide additional flexibility to resolve the land use dispute.

Summary

The Commission needs to take action to help resolve the antenna siting issue. The process today is costly and slow; in our case the zoning process will take four or more years. And after such a long process, there is no assurance of a successful conclusion. Regardless of the outcome of the preemption preceding, the Commission should consider acting as a mediator and providing for additional flexibility of its rules to help resolve some of the tower siting disputes.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard L. Harvey", written over a horizontal line.

Richard L. Harvey
WBHX
1018 Hillcrest Drive
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08853

October 28, 1997

Appendix A

Timeline

Feb., 1994	Construction Permit Issued.
March., 1994	Informal Hearing with the Zoning Board was held.
June, 1994	Zoning Application is made.
March 23, 1995	First Zoning Hearing is held.
March 30, 1995	Second Zoning Hearing.
April 11, 1995	Third Zoning Hearing.
May 25, 1995	Fourth Zoning Hearing.
July 25, 1995	Fifth Zoning Hearing
August 8, 1995	Sixth Zoning Hearing
Sept., 1995	Draft of Zoning Board Decision received
Oct. 5, 1995	Zoning Board Publishes its Decision
Nov. 17, 1995	Filed Suit in Superior Court
July, 1996	Conference with Judge
Oct., 1996 - Feb., 1997	There were numerous delays. One delay was caused by the need to reconstruct a tape which arrived damaged from the Zoning Board. The Zoning Board's attorney requested and received four extensions of the hearing date. The Judge then rescheduled the hearing on his own motion resulting in an additional one-month delay.
March 24, 1997	Court Hearing
April, 1997	Court was not provided many of the zoning exhibits by the Zoning Board. We needed to make new ones.
May 28, 1997	The Judge issues his decision denying the appeal.

The total time from initial zoning application to receiving a negative court decision was 36 months.

July 11, 1997 Filed an Appeal to the Superior Court - Appellate Division.

It is anticipated that this process will take an additional year; and the outcome is still uncertain. The total process from the zoning application to Appellate Court decision is predicted to total at least 48 months. If successful, WBHX will still need to apply to the Zoning Board for final site approval, perhaps adding 3 or more months. WBHX is proceeding to relocate its site to the barrier island area in an attempt to expedite the approval process.